

REQUEST FOR AN INTERFERENCE

As set forth below, an interference exists and should be declared between new claims 21 to 44 of the instant Mongeon application and claims 1 to 39 of U.S. Patent No. 6,386,199 to Alfery ("the Alfery patent"). Each of the requirements of 37 C.F.R. § 1.607 is addressed below, *seriatim*. The instant Mongeon application is a continuation-in-part of U.S. Patent Appl. Serial No. 09/291,715 (hereinafter referred to as "the '715 application"), which issued as U.S. Patent No. 6,390,093 on May 21, 2002. The effective filing date of the '715 application is April 14, 1999, which is prior to the effective filing date of September 29, 1999 for the Alfery patent. Therefore, no declarations pursuant to 37 C.F.R. § 1.608(b) are required to be included herewith.

I. Compliance With 37 C.F.R. § 1.607

(1) Identity of the Interfering Patent

As set forth above, the Applicant hereby respectfully requests that an interference be declared between claims of the instant Mongeon application and claims in U.S. Patent No. 6,386,199 to Alfery, which issued on May 14, 2002.

(2) Presentation of the Proposed Counts

The Applicant respectfully proposes that the following four counts be established in the interference between the instant Mongeon application and the Alfery patent:

COUNTS 1, 2, 3 & 4

Count 1

An oral airway comprising:

an elongate tubular member having a distal end and a proximal end;

an enlarged housing at the distal end of the elongate tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the housing having walls forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading the wedge-shaped housing as the wedge-shaped housing is inserted into the mouth and pharynx of a patient, there being an opening separating the walls at the leading distal portion of the housing; and
a grate covering the opening.

Count 2

A method of providing an oral airway to a patient comprising:

providing an elongate tubular member having a distal and a proximal end with an enlarged housing at the distal end of the tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the tubular member extending from the mouth of the patient, the housing having walls forming an enlarged proximal portion tapering to a smaller distal portion with a leading opening separating the walls at the distal end of the housing and a grate covering the leading opening;

inserting the housing into the mouth of the patient;

axially advancing the housing to slide the epiglottis up the grate; and

seating the housing with the proximal portion of the mask opening portion abutting the laryngeal opening of the patient or a leading surface of the enlarged proximal portion abutting

the patient's aryepiglottic folds, a wall at the proximal end of the housing abutting the epiglottis and the grate adjacent to the glottis.

Count 3

An oral airway comprising:

an elongate tubular member having a distal end and a proximal end;

an enlarged housing at the distal end of the elongate tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the housing having walls forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading the housing as the housing is inserted into the mouth and pharynx of a patient, there being an opening separating the walls at the leading distal portion of the housing; and

a grate covering the opening, the grate being inclined between the walls so that as a patient's epiglottis is engaged by the grate during insertion of the housing into the hypopharynx the epiglottis slides up the grate and into abutment with a wall of the housing, the grate being made of a flexible material that is rigid enough to slide the epiglottis into abutment with the wall of the housing as the housing is inserted into the hypopharynx and flexible enough such that the flexible grate material, defining apertures between the grate, is displaceable.

Count 4

An oral airway comprising:

an elongate tubular member having a leading distal end and a proximal end, the leading distal end leading the elongate tubular member as the elongate tubular member is inserted into the mouth and pharynx of the patient, there being an opening at the leading distal end that is inclined, a posterior portion of the distal end extending beyond an anterior portion of the distal end; and

a grate covering the opening, the grate being configured so that as a patient's epiglottis is engaged by the grate during insertion of the distal end into the hypopharynx, the epiglottis slides along the grate and into abutment with an anterior portion of the elongate tubular member.

Count 1 is a phantom count, as defined in 37 C.F.R. § 1.601(f), as it is broader than all of the claims that correspond to it in either the instant Mongeon application or the Alfery patent. Count 1 was prepared essentially by combining claim 21 of the instant Mongeon application with claim 1 of the Alfery patent, which two claims recite overlapping subject matter and embrace the same patentable invention as defined in 37 C.F.R. § 1.601(n).¹

Count 2 is also a phantom count, as defined in 37 C.F.R. § 1.601(f), as it is broader than all of the claims that correspond to it in either the instant Mongeon application or the Alfery patent. Count 2 was prepared essentially by combining claim 38 of the instant Mongeon application with claim 30 of the Alfery patent, which two claims recite overlapping subject

¹ Pursuant to 37 C.F.R. § 1.601(n), "Invention A is the *same patentable invention* as invention 'B' when invention 'A' is the same as (35 U.S.C. 102) or is obvious (35 U.S.C. 103) in view of invention 'B' assuming invention 'B' is prior art with respect to invention 'A.'" Here, claims 1 and 35 of the Alfery patent and claims 21 and 44 of the instant Mongeon application recite overlapping subject matter and each is the "same patentable invention" as the other.

matter and embrace the same patentable invention as defined in 37 C.F.R. § 1.601(n). Count 2 is a separate patentable invention from Count 1, as defined in 37 C.F.R. §1.601(n), since Count 2 is directed to a method for using the oral airway recited in Count 1, which method is neither anticipated by nor obvious over the subject matter of Count 1.

Count 3 is also a phantom count, as defined in 37 C.F.R. § 1.601(f), as it is broader than all of the claims that correspond to it in either the instant Mongeon application or the Alfery patent. Count 3 was prepared essentially by combining claim 30 of the instant Mongeon application with claim 18 of the Alfery patent, which two claims recite overlapping subject matter and embrace the same patentable invention as defined in 37 C.F.R. § 1.601(n). Count 3 is a separate patentable invention from Counts 1 and 2, as defined in 37 C.F.R. §1.601(n), since Count 3 includes a limitation that renders the recited subject matter as a whole neither anticipated by nor obvious over the subject matter recited in Counts 1 and 2, for instance, a grate being made of a flexible material that is rigid enough to slide the epiglottis into abutment with the wall of the mask opening portion as the mask opening portion is inserted into the hypopharynx and flexible enough such that the flexible grate material, defining apertures between the grate, is displaceable.

Count 4, however, recites exactly the same language as claim 41 of the instant Mongeon application and claim 35 of the Alfery patent, i.e., claim 41 of the instant Mongeon application is a copy of claim 35 of the Alfery patent. Count 4 is a separate patentable invention from Counts 1, 2 and 3, as defined in 37 C.F.R. §1.601(a), since Count 4 includes a configuration that renders the recited subject matter as a whole neither anticipated by nor obvious over the subject matter recited in Counts 1, 2 and 3. For instance, Count 4 recites the airway device having an inclined opening at the leading distal end.

The chart presented on the following pages compares the language of claim 21 of the instant Mongeon application and claim 1 of the Alfery patent, demonstrates that they are the “same patentable invention,” and further demonstrates how Count 1 was formulated by the Applicant in light of the overlapping language of those claims.

FORMULATION OF COUNT 1

Claim 21 of the Mongeon Application	Claim 1 of the Alfery Patent	Comparison of Claim 21 and Claim 1, and Formulation of Count 1
An oral airway comprising:	An oral airway comprising:	These are identical. Therefore, the feature presented in phantom Count 1 is the same as that recited in both claim 21 of the instant Mongeon application and claim 1 of the Alfery patent: An oral airway comprising:
an elongate tubular member having a distal end and a proximal end;	an elongate tubular member having a distal and a proximal end;	These are identical. Therefore, the feature presented in phantom Count 1 is the same as that recited in both claim 21 of the instant Mongeon application and claim 1 of the Alfery patent: an elongate tubular member having a distal end and a proximal end.

<p>an enlarged mask opening portion at the distal end of the elongate tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the mask opening portion having walls forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading the mask opening portion as the mask opening portion is inserted into the mouth and pharynx of the patient, there being an opening separating the walls at the leading distal portion of the mask opening portion; and</p>	<p>an enlarged wedge-shaped housing at the distal end of the elongate tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the wedge-shaped housing having anterior and posterior walls forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading the wedge-shaped housing as the wedge-shaped housing is inserted into the mouth and pharynx of a patient, there being an opening separating the anterior and posterior walls at the leading distal portion of the housing; and</p>	<p>Claim 21 of the instant Mongeon application refers to a “mask opening portion”. Claim 1 of the Alfery patent refers to “a housing”, which does not distinguish claim 1 of the Alfery patent from the same patentable invention of claim 21 of the instant Mongeon application. Claim 1 of the Alfery patent includes the limitation “wedge-shaped” referring to housing, which does not distinguish claim 1 of the Alfery patent from the same patentable invention of claim 21 of the instant Mongeon application. Claim 21 of the instant Mongeon application refers to “walls” that form the opening. Claim 1 of the Alfery patent refers to “anterior and posterior walls”, which does not distinguish claim 1 of the Alfery patent from the same patentable invention of claim 21 of the instant Mongeon application.</p> <p>Therefore, the phantom Count 1 recites: an enlarged housing at the distal end of the elongate tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the housing having walls</p>
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		forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading the housing as the housing is inserted into the mouth and pharynx of a patient, there being an opening separating the walls at the leading distal portion of the housing; and
a grate covering the opening.	a grate covering the opening.	<p>This is identical.</p> <p>Therefore, the feature presented in phantom Count 1 is the same as that recited in both claim 21 of the instant Mongeon application and claim 1 of the Alfery patent:</p> <p>a grate covering the opening.</p>

The chart presented on the following pages compares the language of claim 38 of the instant Mongeon application and claim 30 of the Alfery patent, demonstrates that they are the “same patentable invention,” and further demonstrates how Count 2 was formulated by the Applicant in light of the overlapping language of those claims.

FORMULATION OF COUNT 2

Claim 38 of the Mongeon Application	Claim 30 of the Alfery Patent	Comparison of Claim 38 and Claim 30, and Formulation of Count 2
<p>A method of providing an oral airway to a patient comprising:</p>	<p>A method of providing an oral airway to a patient comprising:</p>	<p>These are identical.</p> <p>Therefore, the feature presented in phantom Count 2 is the same as that recited in both claim 38 of the instant Mongeon application and claim 30 of the Alfery patent:</p> <p>A method of providing an oral airway to a patient comprising:</p>
<p>providing an elongate tubular member having a distal end and a proximal end with an enlarged mask opening portion at the distal end of the elongate tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the elongate tubular member extending from the mouth of the patient, the mask opening portion having walls forming an enlarged proximal portion tapering to a smaller distal portion with a leading opening separating the walls at the distal end of the mask opening portion and a grate covering the leading opening;</p>	<p>providing an elongate tubular member having a distal and a proximal end with an enlarged wedge-shaped housing at the distal end of the tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the tubular member extending from the mouth of the patient, the wedge-shaped housing having anterior and posterior walls forming an enlarged proximal portion tapering to a smaller distal portion with a leading opening separating the anterior and posterior walls at the distal end of the housing and a grate covering the leading opening;</p>	<p>Claim 38 of the instant Mongeon application refers to a "mask opening portion". Claim 30 of the Alfery patent refers to "a housing", which does not distinguish claim 30 of the Alfery patent from the same patentable invention of claim 38 of the instant Mongeon application. Claim 30 of the Alfery patent includes the limitation "wedge-shaped" referring to housing, which does not distinguish claim 30 of the Alfery patent from the same patentable invention of claim 38 of the instant Mongeon application. Claim 38 of the instant Mongeon application refers to "walls" that form the opening. Claim 30 of the Alfery patent refers to "anterior and</p>

		<p>posterior walls”, which does not distinguish claim 30 of the Alfery patent from the same patentable invention of claim 38 of the instant Mongeon application.</p> <p>Therefore, the phantom Count 2 recites: providing an elongate tubular member having a distal and a proximal end with an enlarged housing at the distal end of the tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the tubular member extending from the mouth of the patient, the housing having walls forming an enlarged proximal portion tapering to a smaller distal portion with a leading opening separating the walls at the distal end of the housing and a grate covering the leading opening;</p>
inserting the mask opening portion into the mouth of the patient;	inserting the wedge-shaped housing into the mouth of the patient;	<p>See above.</p> <p>Therefore, the phantom Count 2 recites: inserting the housing into the mouth of the patient;</p>
axially advancing the mask opening portion to slide the epiglottis up the grate; and	axially advancing the wedge-shaped housing to slide the epiglottis up the grate; and	<p>See above.</p> <p>Therefore, the phantom Count 2 recites: axially advancing the housing to slide the epiglottis up the grate;</p>
seating the mask opening portion with the proximal portion of the mask opening	seating the wedge-shaped housing with a leading surface of the enlarged	<p>Claim 38 of the instant Mongeon application refers to “the proximal portion of</p>

<p>portion abutting the laryngeal opening of the patient, a wall at the proximal end of the mask opening portion abutting the epiglottis and the grate adjacent to the glottis.</p>	<p>proximal portion abutting the patient's aryepiglottic folds, the anterior wall of the wedge-shaped housing abutting the epiglottis and the grate adjacent to the glottis.</p>	<p>the mask opening portion abutting the laryngeal opening of the patient". Claim 30 of the Alfery patent refers to "a leading surface of the enlarged proximal portion abutting the patient's aryepiglottic folds", which does not distinguish claim 30 of the Alfery patent from the same patentable invention of claim 38 of the instant Mongeon application. Claim 38 of the instant Mongeon application refers to "a wall at the proximal end of the mask opening portion" abutting the epiglottis. Claim 30 of the Alfery patent refers to "the anterior wall of the wedge-shaped housing", which does not distinguish claim 30 of the Alfery patent from the same patentable invention of claim 38 of the instant Mongeon application.</p> <p>Therefore, the phantom Count 2 recites: seating the housing with the proximal portion of the mask opening portion abutting the laryngeal opening of the patient or a leading surface of the enlarged proximal portion abutting the patient's aryepiglottic folds, a wall at the proximal end of the housing abutting the epiglottis and the grate adjacent to the glottis.</p>
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The chart presented on the following pages compares the language of claim 30 of the instant Mongeon application and claim 18 of the Alfery patent, demonstrates that they are the “same patentable invention,” and further demonstrates how Count 3 was formulated by the Applicant in light of the overlapping language of those claims.

FORMULATION OF COUNT 3

Claim 30 of the Mongeon Application	Claim 18 of the Alfery Patent	Comparison of Claim 30 and Claim 18, and Formulation of Count 3
An oral airway comprising:	An oral airway comprising:	These are identical. Therefore, the feature presented in phantom Count 1 is the same as that recited in both claim 21 of the instant Mongeon application and claim 1 of the Alfery patent: An oral airway comprising:
an elongate tubular member having a distal end and a proximal end;	an elongate tubular member having a distal and a proximal end;	These are identical. Therefore, the feature presented in phantom Count 3 is the same as that recited in both claim 30 of the instant Mongeon application and claim 18 of the Alfery patent: an elongate tubular member having a distal end and a proximal end.
an enlarged mask opening portion at the distal end of the elongate tubular member for insertion into the mouth and	an enlarged wedge-shaped housing at the distal end of the elongate tubular member for insertion into the mouth	Claim 30 of the instant Mongeon application refers to a “mask opening portion”. Claim 18 of the Alfery patent

pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the mask opening portion having walls forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading the mask opening portion as the mask opening portion is inserted into the mouth and pharynx of a patient, there being an opening separating the walls at the leading distal portion of the mask opening portion; and

and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the wedge-shaped housing having anterior and posterior walls forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading the wedge-shaped housing as the wedge-shaped housing is inserted into the mouth and pharynx of a patient, there being an opening separating the anterior and posterior walls at the leading distal portion of the wedge-shaped housing; and

refers to a "housing", which does not distinguish claim 18 of the Alfery patent from the same patentable invention of claim 30 of the instant Mongeon application. Claim 18 of the Alfery patent includes the limitation "wedge-shaped" referring to housing, which does not distinguish claim 18 of the Alfery patent from the same patentable invention of claim 30 of the instant Mongeon application. Claim 30 of the instant Mongeon application refers to "walls" that form the opening. Claim 18 of the Alfery patent refers to "anterior and posterior walls", which does not distinguish claim 18 of the Alfery patent from the same patentable invention of claim 30 of the instant Mongeon application.

Therefore, the phantom Count 3 recites:

an enlarged housing at the distal end of the elongate tubular member for insertion into the mouth and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient, the housing having walls forming an enlarged proximal portion tapering to a smaller leading distal portion, the leading distal portion leading

		the housing as the housing is inserted into the mouth and pharynx of a patient, there being an opening separating the walls at the leading distal portion of the housing; and
<p>a grate covering the opening, the grate being inclined between the walls so that as a patient's epiglottis is engaged by the grate during insertion of the mask opening portion into the hypopharynx the epiglottis slides up the grate and into abutment with a wall of the mask opening portion,</p> <p>the grate being made of a flexible material that is rigid enough to slide the epiglottis into abutment with the wall of the mask opening portion as the mask opening portion is inserted into the hypopharynx and flexible enough such that the flexible grate material, defining apertures between the grate, is displaceable.</p>	<p>a grate covering the opening, the grate being inclined between the posterior and anterior walls so that as a patient's epiglottis is engaged by the grate during insertion of the wedge-shaped housing into the hypopharynx the epiglottis slides up the grate and into abutment with the anterior wall of the wedge-shaped housing,</p> <p>the grate being made of a flexible material that is rigid enough to slide the epiglottis into abutment with the anterior wall of the wedge-shaped housing as the wedge-shaped housing is inserted into the hypopharynx and flexible enough to enable an endotracheal tube to be axially driven between a gap defined by the grate by displacing the flexible grate material defining the gap.</p>	<p>See above. Furthermore, claim 30 of the instant Mongeon application refers to an "aperture". Claim 18 of the Alfery patent refers to a "gap", which does not distinguish claim 18 of the Alfery patent from the same patentable invention of claim 30 of the instant Mongeon application.</p> <p>Therefore, the phantom Count 3 recites:</p> <p>a grate covering the opening, the grate being inclined between the walls so that as a patient's epiglottis is engaged by the grate during insertion of the housing into the hypopharynx the epiglottis slides up the grate and into abutment with a wall of the housing, the grate being made of a flexible material that is rigid enough to slide the epiglottis into abutment with the wall of the housing as the housing is inserted into the hypopharynx and flexible enough such that the flexible grate material, defining apertures between the grate, is displaceable.</p>

**(3) Alfery Patent Claims that Correspond to the Counts
and an Explanation of Their Correspondence to the Counts**

As explained above, proposed Count 1 is a phantom count and, therefore, none of the claims in the Alfery patent corresponds exactly to this count. However, claims 1 to 17 of the Alfery patent should be designated as corresponding to Count 1, as each of those claims corresponds substantially to that count.²

Claim 1 of the Alfery patent is fully embraced within Count 1 and is the same patentable invention as that count. Count 1 does not include the limitation “wedge-shaped” referring to the housing as in claim 1 of the Alfery patent. Count 1 refers to “walls” that form the opening rather than “anterior and posterior walls” as in claim 1 of the Alfery patent. Otherwise the recitation of these airway tubes are virtually identical.

Claims 2 to 17 of the Alfery patent depend from claim 1 of that patent. Claims 1 to 17 are directed to the same patentable invention as each other and as to Count 1. The further limitations recited in claims 2 to 17 are merely obvious embodiments of the broader subject matter encompassed by claim 1. Thus, claims 2 to 17 should be designated as substantially corresponding to Count 1.

As explained above, proposed Count 2 is also a phantom count and, therefore, none of the claims in the Alfery patent corresponds exactly to this count. However, claims 30 to 34 of the

² Pursuant to 37 C.F.R. § 1.601(f), “A claim of a patent or application that is designated to correspond to a count but is not identical to the count is said to correspond substantially to the count.”

Alfery patent should be designated as corresponding to Count 2, as each of those claims corresponds substantially to that count.

Claim 30 of the Alfery patent is fully embraced within Count 2 and is the same patentable invention as that count. Count 2 does not include the limitation “wedge-shaped” referring to the housing as in claim 30 of the Alfery patent. Also, Count 2 refers to “walls” that form the opening rather than “anterior and posterior walls” as in claim 30 of the Alfery patent. In addition, Count 2 recites “the proximal portion of the mask opening portion abutting the laryngeal opening of the patient or a leading surface of the enlarged proximal portion abutting the patient's aryepiglottic folds” rather than “a leading surface of the enlarged proximal portion abutting the patient's aryepiglottic folds” as in claim 30 of the Alfery patent. Still further, Count 2 recites “a wall at the proximal end of the housing” abutting the epiglottis rather than “the anterior wall of the wedge-shaped housing” as in claim 30 of the Alfery patent. Otherwise the recitation of these methods are virtually identical.

Claims 31 to 34 of the Alfery patent depend from claim 30 of that patent. Claims 30 to 34 are directed to the same patentable invention as each other and as to Count 2. The further limitations recited in claims 31 to 34 are merely obvious embodiments of the broader subject matter encompassed by claim 30. Thus, claims 31 to 34 should be designated as substantially corresponding to Count 2.

As explained above, proposed Count 3 is also a phantom count and, therefore, none of the claims in the Alfery patent corresponds exactly to this count. However, claims 18 to 29 of the Alfery patent should be designated as corresponding to Count 3, as each of those claims corresponds substantially to that count.

Claim 18 of the Alfery patent is fully embraced within Count 3 and is the same patentable invention as that count. Count 3 does not include the limitation “wedge-shaped” referring to the housing as in claim 18 of the Alfery patent. Count 3 refers to “walls” that form the opening rather than “anterior and posterior walls” as in claim 18 of the Alfery patent. Otherwise the recitation of these airway tubes are virtually identical.

Claims 19 to 29 of the Alfery patent depend from claim 18 of that patent. Claims 18 to 29 are directed to the same patentable invention as each other and as to Count 3. The further limitations recited in claims 19 to 29 are merely obvious embodiments of the broader subject matter encompassed by claim 18. Thus, claims 19 to 29 should be designated as substantially corresponding to Count 3.

As explained above, proposed Count 4 is a copy of claim 35 in the Alfery patent, and thus claim 35 of the Alfery patent corresponds exactly to this count.

Claims 36 to 39 of the Alfery patent depend from claim 35 of that patent. Claims 35 to 39 are directed to the same patentable invention as each other and as to Count 4. The further limitations recited in claims 36 to 39 are merely obvious embodiments of the broader subject matter encompassed by claim 35. Thus, claims 36 to 39 should be designated as substantially corresponding to Count 4.

**(4) Claims in this Mongeon Application that Correspond to the Counts
and an Explanation of Their Correspondence to the Counts**

New claim 21 of the instant Mongeon application is fully embraced within Count 1 and is the same patentable invention as that count. Claim 21 of the instant Mongeon application refers to a "mask opening portion" rather than "a housing" as in Count 1, but otherwise the recitation of these airway tubes are virtually identical.

Claims 22 to 29 depend from claim 21, and are the same patentable invention as claim 21. Accordingly, like claim 21 from which they depend, each of claims 22 to 29 is the same patentable invention as Count 1 and should be designated as substantially corresponding to that count.

New claim 38 of the instant Mongeon application is fully embraced within Count 2 and is the same patentable invention as that count. Claim 38 of the instant Mongeon application refers to a "mask opening portion" rather than "a housing" as in Count 2. Also, claim 38 of the instant Mongeon application refers to "the proximal portion of the mask opening portion abutting the laryngeal opening of the patient" rather than "the proximal portion of the mask opening portion abutting the laryngeal opening of the patient or a leading surface of the enlarged proximal portion abutting the patient's aryepiglottic folds" as in Count 2. Otherwise the recitation of these methods are virtually identical.

Claims 39 to 40 depend from claim 38, and are the same patentable invention as claim 38. Accordingly, like claim 38 from which they depend, each of claims 39 to 40 is the same patentable invention as Count 2 and should be designated as substantially corresponding to that count.

New claim 30 of the instant Mongeon application is fully embraced within Count 3 and is the same patentable invention as that count. Claim 30 of the instant Mongeon application refers

to a "mask opening portion" rather than "a housing" as in Count 3. Also, claim 30 of the instant Mongeon application refers to "an aperture" between the grate being displaceable rather than "a gap" as in Count 3. Otherwise the recitation of these airway tubes are virtually identical.

Claims 31 to 37 depend from claim 30, and are the same patentable invention as claim 30. Accordingly, like claim 30 from which they depend, each of claims 31 to 37 is the same patentable invention as Count 3 and should be designated as substantially corresponding to that count.

As explained above, proposed Count 4 is a copy of claim 35 of the Alfery patent as well as a copy of the new claim 41 of the instant Mongeon application. Therefore, new claim 41 should be designated as corresponding to that count.

Claims 42 to 44 depend from claim 41, and are the same patentable invention as claim 41. Accordingly, like claim 41 from which they depend, each of claims 42 to 44 is the same patentable invention as Count 4 and should be designated as substantially corresponding to that count.

**(5) Applying the Terms of the Claims Added to this Application
through this Amendment to this Application's Disclosure**

The subject matter of newly added claims 21 through 44 is described throughout the specification of the instant Mongeon application, which provides support under § 112 for each of claims 21 to 44.

For instance, with respect to claims 21, 30, 34, 38 and 41, the instant Mongeon application describes an oral airway, e.g., an artificial airway, that includes an elongate tubular member, e.g., airway tube 200. The elongate tubular member has a distal end and a proximal end. The instant Mongeon application also describes a mask opening portion 110 that is enlarged relative to the elongate tubular member (see Figures 1 to 8 illustrating that the mask opening portion is enlarged relative to the elongate tubular member). The mask opening portion 110 is located at the distal end of the elongate tubular member. Specification at page 11, lines 1 to 3. The mask opening portion 110 is inserted into the mouth and pharynx of a patient with the proximal end of the elongate tubular member adapted to extend from the mouth of the patient (see, for example, Figures 7 and 8). As illustrated in Figure 1 to 8, the instant Mongeon application also discloses that the mask opening portion 110 has walls forming an enlarged proximal portion tapering to a smaller leading distal portion (see especially Figure 3 that illustrates that the proximal end of the mask opening portion 110 is larger than, and tapers down to, the smaller distal end of the mask opening portion 110). The leading distal portion of the mask opening portion 110 leads the mask opening portion 110 relative to the other parts of the mask opening portion 110 as the mask opening portion 110 is inserted into the mouth and pharynx of the patient (see, for example, Figures 7 and 8). The instant Mongeon application describes that there is an opening, e.g., mask opening 111, separating the walls of the mask opening portion 110 at the leading distal portion of the mask opening portion 110. Specification at page 12, lines 31 to page 13, line 4. The instant Mongeon application describes that, when the airway is in the operative position, the mask opening 111 is positioned so as to cover the

laryngeal opening of the larynx (see Figure 8 and Specification at page 13, lines 4 to 9), which is precisely the position of the opening of the oral airway of Alfery when in the operative position.

With respect to these claims 21, 30, 34, 38 and 41, and also to new claim 37, the instant Mongeon application also describes a grate covering the opening. Specifically, the instant Mongeon application states at page 14, lines 22 to 28, that “the mask opening 111 is formed by a plurality of apertures 142 disposed in and through the surface of the mask opening portion 110 [and that] these apertures 142 are used to pass air, oxygen, anesthesia or other gases from the airway tube 200 through the mask portion 100 and into the patient’s larynx L.” The instant Mongeon application also states that “[t]he apertures 142 are separated from one another by a series of bars 143 forming a grate.” (Emphasis added). The instant Mongeon application states that purpose of the bars 143 that form the grate is “to restrain any anatomical portion, and in particular the epiglottis G, from entering into and blocking or partially blocking, the mask opening 111, thereby preventing obstruction of the delivery or removal of gases from the respiratory system of the patient.” Specification at page 14, line 29 to page 15, line 2. This is precisely the purpose of the grate in the Alfery patent.

With respect to new claims 22, 30 and 41, the instant Mongeon application discloses that the grate formed by the bars 143 is inclined within the opening such that a patient's epiglottis is engaged by the grate during insertion of the mask opening portion into the hypopharynx. As illustrated in Figures 2 and 3, the bars 143 that form the grate extend out of the mask opening 111 such that a patient’s epiglottis will slide along the grate as the mask opening portion 110 is inserted into the patient. Furthermore, the instant Mongeon application discloses that, when the mask opening portion 110 is inserted into the patient, the epiglottis of the patient abuts with a

wall at the proximal end of the mask opening portion 110. For instance, the instant Mongeon application states at page 20, lines 30 to 32, that “the mask opening portion 110 pushes the epiglottis G up and away from the mask opening 111, as shown in Figure 8.”

With respect to new claims 23 and 31, the instant Mongeon application discloses a reinforced connection end 300 at the proximal end of the elongate tubular member. The instant Mongeon application states at page 10, lines 23 to 27, that “[c]onnection end 300 may be connected to any known device or mechanism for providing artificial or spontaneous ventilation of a patient and/or for providing oxygen, air, anesthesia or other gases to the respiratory system of the patient.”

With respect to new claims 24 and 35, the instant Mongeon application discloses that the elongate tubular member is sufficiently rigid for insertion and sufficiently flexible to bend to the anatomic contours of the mouth and pharynx during insertion into and upon being seated in a patient. For instance, the instant Mongeon application states at page 11, lines 7 to 16, that “the airway tube 200 is made of a material which is sufficiently flexible to permit it to deform so as to fit down the patient’s airway (see Figures 7 and 8), but is also sufficiently stiff to permit the airway tube 200 and the mask portion 100 to be accurately positioned manually in the patient P [and that] polyvinyl chloride (PVC), or any other known inexpensive, durable and partially flexible material may be used as the material from which the airway tube 200 is made.”

With respect to new claims 25 and 36, the instant Mongeon application discloses that the mask opening portion is formed from a partially flexible material, such that the mask opening portion substantially maintains its shape as the mask opening portion is inserted into and seated within a patient. For instance, the instant Mongeon application states at page 13, lines 29 to 32,

that “the entire mask portion 100 could be integrally molded in one piece from a durable biocompatible material such as urethane or polyvinyl chloride (PVC).” Furthermore, Figures 7 and 8 illustrate that the mask opening portion substantially maintains its shape during operation.

With respect to new claim 26, the instant Mongeon application discloses that the elongate tubular member is sufficiently flexible to permit the elongate tubular member to be deformed as it is inserted into a patient’s airway and sufficiently rigid to prevent crushing or kinking. For instance, the instant Mongeon application states at page 11, lines 7 to 16, that “the airway tube 200 is made of a material which is sufficiently flexible to permit it to deform so as to fit down the patient’s airway (see Figures 7 and 8), but is also sufficiently stiff to permit the airway tube 200 and the mask portion 100 to be accurately positioned manually in the patient P [and that] polyvinyl chloride (PVC), or any other known inexpensive, durable and partially flexible material may be used as the material from which the airway tube 200 is made.”

With respect to new claims 27, 34 and 44, the instant Mongeon application discloses an inflatable cuff adjacent to the mask opening portion. For instance, the instant Mongeon application states at page 11, lines 29 to 31, that “[t]he inflatable cuff 800, which is in the form of a fluid-expandable pillow or cuff, is mounted on the shaft of the airway tube 200, in a location on the tube 200 where it is adjacent the tongue T and behind the uvula U of the patient P in the pharynx when the mask opening portion 110 of the present invention is in place over the larynx L (see Figures 7 and 8).” Figures 7 and 8 illustrate the inflatable cuff to be positioned immediately adjacent to the mask opening portion.

With respect to new claims 28, 33 and 40, the instant Mongeon application discloses a connection at the proximal end of the elongate tubular member to facilitate connection of the

proximal end of the elongate tubular member to one of a respiratory device or an anesthesia device. For instance, the instant Mongeon application states at page 10, lines 23 to 27, that “[c]onnection end 300 may be connected to any known device or mechanism for providing artificial or spontaneous ventilation of a patient and/or for providing oxygen, air, anesthesia or other gases to the respiratory system of the patient.”

With respect to new claims 29, 32 and 39, the instant Mongeon application discloses an inflatable cuff radially surrounding the elongate tubular member proximate the proximal end of the mask opening portion. For instance, the instant Mongeon application states at page 11, lines 29 to 31, that “[t]he inflatable cuff 800, which is in the form of a fluid-expandable pillow or cuff, is mounted on the shaft of the airway tube 200, in a location on the tube 200 where it is adjacent the tongue T and behind the uvula U of the patient P in the pharynx when the mask opening portion 110 of the present invention is in place over the larynx L (see Figures 7 and 8).”

With respect to new claims 30 and 43, the instant Mongeon application discloses that the grate is made of a flexible material that is rigid enough for the epiglottis to slide along prior to the epiglottis abutting the proximal end of the mask opening portion as the mask opening portion is inserted into the hypopharynx and flexible enough such that the flexible grate material, defining apertures between the grate, is displaceable. For instance, the instant Mongeon application states at page 13, lines 29 to 32, that “the entire mask portion 100 could be integrally molded in one piece from a durable biocompatible material such as urethane or polyvinyl chloride (PVC)” which the Specification further states at page 11, lines 13 to 15, is “a partially flexible material.” Since the bars 143 are disclosed as being integrally formed with the rest of the mask opening portion 110, it follows that the bars 143 that form the grate are also formed

from a flexible material, and thus the bars 143 defining the grate are flexible enough such that the flexible grate material, defining apertures between the grate, is displaceable.

With respect to new claim 38, the instant Mongeon application discloses all of the features of the providing step, as described above in connection with claim 21. Furthermore, the instant Mongeon application discloses inserting the mask opening portion into the mouth of the patient (see, for example, Figure 7), axially advancing the mask opening portion to slide the epiglottis along the grate (as described above in connection with claim 22, the bars 143 that form the grate are situated within the mask opening 111 such that a patient's epiglottis slides up the grate as the airway device is inserted into the patient) and seating the mask opening portion with the proximal portion of the mask opening portion abutting the laryngeal opening of the patient, a wall at the proximal end of the mask opening portion abutting the epiglottis and the grate adjacent to the glottis (as described above in connection with claim 22, the mask opening portion 110 pushes the epiglottis G up and away from the mask opening 111).

With respect to new claim 41, the instant Mongeon application discloses all of the features of the oral airway, as described above in connection with claim 21. Furthermore, the instant Mongeon application discloses an opening at the leading distal end that is inclined, a posterior portion of the distal end extending beyond an anterior portion of the distal end. See, for instance, Figure 2, which illustrates that the mask opening 111 is inclined, and that the posterior side of the mask opening portion 110 (the side opposite from the mask opening 111) extends in the distal direction beyond the anterior side of the mask opening portion 110 (the walled edge at the proximal end of the mask opening portion 110 that defines the proximal-most edge of the mask opening 110).

Thus, there can be no dispute that the newly added claims 21 to 44 are fully supported by the disclosure of the instant Mongeon application.

(6) Compliance with 35 U.S.C. § 135(b)

The Alfery patent issued on May 14, 2002, which is less than one year before the presentation of this Amendment and Request for Interference. Thus, the Applicant's instant Request for Interference with the Alfery patent satisfies all of the provisions of 35 U.S.C. § 135(b).

II. Compliance With 37 C.F.R. § 1.608

The instant Mongeon application is a continuation-in-part of U.S. Patent Appl. Serial No. 09/291,715 (hereinafter referred to as "the '715 application"), which issued as U.S. Patent No. 6,390,093 on May 21, 2002. The effective filing date of the '715 application is April 14, 1999, which is prior to the effective filing date of September 29, 1999 for the Alfery patent. Therefore, no declarations pursuant to 37 C.F.R. § 1.608(b) are required to be included herewith.

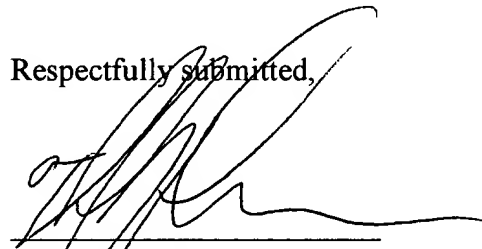
In view of its earlier effective filing date, the undersigned hereby represents, pursuant to 37 C.F.R. § 1.608(a), that there is a basis upon which Applicant is entitled to judgment in this interference over the patentee.

III. Conclusion

For all of the foregoing reasons, the Applicant respectfully submits that an interference should be declared between new claims 21 to 44 of the instant Mongeon application and claims 1 to 39 of the Alfery patent, in the manner and under the proposed counts set forth above. The Applicant further requests that the Examiner contact the undersigned in the event that a discussion of this submission is deemed helpful to resolving this request.

Date: May 13, 2003

Respectfully submitted,



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